IN THE DISTRICT COURT
AT WHANGAREI

CRI-2017-088-000730
[2018] NZDC 3111

MINISTRY FOR PRIMARY INDUSTRIES
Prosecutor

v

TANE EDWARD ZANDERS
Defendant

Hearing: 21 February 2018

Appearances: A Wood for the Prosecutor
A Harvey for the Defendant

Judgment: 21 February 2018

NOTES OF JUDGE C S BLACKIE ON SENTENCING

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[1] Tane Edward Zanders you are here for sentence today on three charges that are laid under the provisions of the Fisheries Act 1996. The charges are more specifically laid under s 230(1)(b) alleging that you have made a false statement on a record required in accordance with that Act namely the monthly harvest returns for August, October and November 2015.

[2] In respect of each of those charges, the maximum penalty provided by law is a fine of $250,000 and/or community-based sentence and/or forfeiture of any vessel or equipment that was utilised during the commission of the offence.

[3] The background to this case, as it is to many fisheries prosecutions that come before the Court, is that New Zealand operates a quota management system which is the cornerstone of the management of the fisheries resource in this country, and

commercial fishing entities are subject to the primary control mechanism which is called The Total Allowable Commercial Catch. This is in relation to all types of fish stock.

[4] Commercial entities, fishing entities, of which you are one, are required to report a summary of catch through what is called The Monthly Harvest Returns. This data is in used to assess commercial catch levels against the total allowable commercial catch.

[5] It follows therefore, that underreporting of catch levels allows a commercial fisherman to take more fish than to which he is entitled.

[6] In addition and, more importantly, perhaps, in this case, it undermines the Ministry of Primary Industries ability to accurately assess the quantity of fish taken out of a fishery, and that directly jeopardises the integrity of the New Zealand quota management system and can affect the very sustainability of our fisheries.

[7] It is reported to the Court that in recent years commercial fishing pressure on grey mullet in New Zealand's upper north island area has steadily increased with catches nearing or exceeding the total allowable commercial catch and in particular it is noted that in the year ended September 2014 the total allowable commercial catch was exceeded by 56,000 kilograms and since 2015 there has been an upward movement in the price of grey mullet in respect of the annual catch entitlement.

[8] Your fishing operation involved the catching of grey mullet. The Ministry estimates that approximately 10 percent of grey mullet catches are unreported.

[9] More specifically, it is alleged against you that in the month of August 2015, you are recorded as having caught 7117 kilograms of grey mullet using your fishing vessel Mia under registration 901190, but when you filed the return on 15 September you recorded the actual catch as being 7017 kilograms having been caught, thereby under-reporting by 100 kilograms.

[10] It followed though, in October, the same procedure was adopted but this time the under reporting was in respect of 360 kilograms and, again, in November you record having caught only 2809 kilograms but under-report it by 471 kilograms.

[11] So, over three months, 931 kilograms were not reported. I am told that would have had a value in the fish market of $4139.74.

[12] Obviously, these discrepancies came to the notice of the fisheries authorities and you were required to make amendments to your catch records to coincide with what had been received by the wholesalers once the fish were landed ashore and although amendments were made it did take some months for this to be completed, indeed over five months, which might appear to have been an inordinate amount of time if there had simply been a human error.

[13] The penalties, as I say, for this type of offending are fines and very substantial fines which can be applied in serious cases. There has been a deliberate policy by Parliament over the years to increase the fines to more substantial levels in order to reflect the concern to protect our valuable marine resources.

[14] In this case, the Ministry is seeking that I impose a fine in respect of each of the charges and also that there must follow automatically by operation of law an order for the forfeiture of the vessel that you were using at the time.

[15] In written submissions to me, the Ministry has pointed out a number of the factors which I have already referred to as issues which the Court must take into account when dealing with sentences as far as fisheries prosecutions are concerned.

[16] One of the factors which the Crown drew the Court's attention to is a specific provision of the Fisheries Act which states as follows:

> **254 Matters to be taken into account by court in sentencing**
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> If any person is convicted of an offence against this Act, the court shall, in imposing sentence, take into account the purpose of this Act and shall have regard to—
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> (a) the difficulties inherent in detecting fisheries offences; and

(b) the need to maintain adequate deterrents against the commission of such offences.

[17] So, the Court is specifically instructed by Parliament to consider deterrence for this type of offending as a primary factor in the sentencing process.

[18] There are other points which the Ministry makes in its submissions that they say pertain more particularly to you. They talk about the extent of the loss or damage and the harm to the resource, which follows from the under-reporting of a specific catch.

[19] They point also to the fact that fishermen like yourself are trusted and have to be trusted by the Ministry and by the New Zealand community to be honest and careful in the recording of their catches. We do not have the resources to have fisheries officers or inspectors on every vessel, or even available to do routine patrols to check every vessel.

[20] Reliance has to be placed on the accuracy of the records maintained by the individual fisherman or fishing enterprise, and that is why it is that the offending is what we call, "strict liability,' in other words, it is very difficult to defend a case of this nature. If there is under-reporting, then there is a strict liability as far as the law is concerned.

[21] The Ministry also points out that there could have been, in your case, pre-meditation and they look further to that, your previous convictions.

[22] I have to say, however, having made those comments that, today, the Ministry took a somewhat more moderate approach than they did when their submissions were originally prepared and that is they now accept that there is no evidence that you gained any substantial gain in monetary terms in respect of the errors that occurred in your fishery returns, and secondly and perhaps more importantly, that it was done as a result of human error, that is, carelessness or negligence rather than any deliberate intent to deceive or provide deliberate false returns.

[23] Therefore, the Ministry suggest that the level of financial penalty I should impose should be from a reduced starting point, initially suggested at $9000, to one in the vicinity of $4000.

[24] Your counsel has advanced submissions that two steps should be looked as far as you are concerned.

[25] Firstly, that the Court refrain from making a forfeiture order. In other words, an order for the forfeiture of your vessel.

[26] And secondly, that the Court consider discharging you without conviction at all. In other words, just walk out of the Court as though you had been acquitted of any offending.

[27] Mr Harvey submits that your offending was out of the ordinary and therefore would qualify for the Court to take a somewhat unusual step of not making a forfeiture order. He says it was out of the ordinary, firstly because you did not do this deliberately and, secondly, it was simply a human error. He points to a number of cases, or, indirectly to a number of cases, where forfeiture has not been awarded. The one that he relies on primarily is the case of *Novoselic v the Ministry of Fisheries,*[1]*a* decision of the High Court in Christchurch, Chisholm J, given on 2 April 2008. In that case the defendant *Novoselic* who had omitted material information in respect of returns and was fined a total of $18,000 and initially an order was made for the forfeiture of the defendant's vessel.

[28] The defendant appealed not against the fines but in relation to the seizure or forfeiture, and in that case the Court found that there were some special reasons that existed.

[29] I should say that special reasons are defined or have been defined for the Courts in the case of *Bassell v Atwell.*[2] the Court of Appeal decision of 2 May 1995, and the Court said that a "special reason is one that is not found in the common run of cases,

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[1] *Novoselic v Ministry of Fisheries* HC Christchurch, 2 April 2008 (HC)
[2] *Bassel v Atwell* 2 May 1995 (CA)

while not necessarily categorised as exceptional or extraordinary is one that maybe properly characterised as not ordinary or common or usual".

[30] Chisholm J adopted that "special reason" test and he found that the defendant had actually engaged an outside third party to file the appropriate catch returns, a reliable third party. The defendant had taken an additional step, not relying on his own work, to carry out and file returns but to get somebody else, a professional, to do it.

[31] It was the professional that was at fault. Chisholm J took into account the fact that a professional had been engaged as a special reason why there should not be forfeiture. He took the view that it was not the defendant's fault there were inaccurate returns, it was the professional. Nevertheless, strict liability applied and the fines remained.

[32] Mr Harvey submits to me that the fact there was no gain to you, that it was all done out of human error would be a special circumstance.

[33] Well, I do not find that to be the position. I consider that what happened here was in fact a usual or common circumstance. People make errors, people are careless, people are negligent, is a common factor. That is just the nature of things, but there is nothing unusual about that. It does not therefore reach the standard it was found in the case of *Novoselic*, where somebody else, not the defendant, was the careless party. In your case, you have to be considered the careless party, even though the Ministry accepts as being not intentional.

[34] So, I am unable to resist the application by the Ministry to make a forfeiture order.

[35] Following that though, Mr Harvey submitted that I should discharge without conviction. There is a difficulty to that because I cannot discharge you without conviction unless I can make an order against forfeiture. But just assuming for a moment that I was able to make the non-forfeiture order, could I still discharge you without conviction?

[36] You say in your affidavit that you are a professional fisherman and always have been, that is your life, your livelihood and the only livelihood that you have been involved in for many years.

[37] Mr Harvey repeats the factors that I have already referred to about no benefit and this being something which is basically an error, negligence, whatever term you might use, but he submits that a conviction would affect you in areas of quota, areas of leasing or licencing, in areas you could possibly be banned under the legislation and areas of character which could affect your ability to skipper a vessel. Those issues are countered by the Ministry. They say you are not subject to quota, you lease your fishing rights and that a conviction would not apply to your ability to maintain or gain a fishing right. They also point out that the question of banning under the Act does not apply in respect of these charges.

[38] Further, character issues are not so significant when it comes to the ability to seek a fishing quota or leasing or licencing. They are, or may be, something which could have an effect on your ability to skipper a boat, where character may be looked at by the Marine Safety Authority and are much more likely to be one's ability to actually safely control a vessel at sea and observe the required standards of seamanship, rather than look at issues relating to catch or under-reporting of catch.

[39] So I do not find or would not find the circumstances of your case to be out of all proportion to the offending for which you are strictly reliable in relation to the under-reporting.

[40] It means, therefore, you go back to the Ministry's submissions and look at the question of an appropriate penalty.

[41] I accept that this offending is now at the lower end of the scale. I accept that it can be dealt with by way of fine only and I accept that the forfeiture issue which I have had to determine must also have a bearing on the fine. Whereas the forfeiture of a vessel does not mean that you are permanently deprived of it, it does mean that you will have to make an application to the Ministry for a relief against the forfeiture. It may be returned to you upon a settlement of an appropriate fee to be paid to the

Ministry within a specified time. That is another issue which may involve you in some expense.

[42] Going back to the fines though, I have to take into account that this is not the first time you have appeared before the Court in relation to a fisheries prosecution. You were seen on several occasions, between 2000 and 2012 in the Manukau District Court facing regulatory offences and in one or two cases, statutory offences, along similar along lines to what you are facing or have faced here today.

[43] In the last occasion I note that you were fined, in 2012, $2000 in respect of three separate offences under the Act. That meant total fines of $6000. I do not have specific details of what those offences were but nevertheless I conclude that there has been an increase over time of the fines that have been imposed upon you. I am not sure either whether those fines would have been imposed for offences which would have involved the forfeiture of any vessel though that may have been likely.

[44] Taking into account the factors which the Ministry have outlined to me today, more particularly though that they have reduced the severity of the offending from what it might have been if there was any deliberateness about your conduct in under-reporting and/or had there been any illicit gains by way of profit out of the underreporting and now I can see that it is simply a matter of carelessness on your part, I am prepared to impose penalties at the much lower end of the scale.

[45] I have to look at the totality of the offending, but I am required to impose a penalty in resect of each of the separate charges.

[46] An aggravating factor, though, is the fact that you have been before the Court before, and must know and have some knowledge of the jeopardy that you would be in if you appear before the Court again in respect of similar type offending.

[47] In my view the appropriate penalty in respect of each of these charges is a fine in the sum of $1500.

[48] Accordingly, on each of the charges, you are now convicted and fined $1500, together with Court costs of $130.

[49] No legal costs are sought.

[50] So the total fine, $1500, will be $4500 all up, plus the costs I have indicated, which will apply in respect of each charge.

[51] I will make an order for forfeiture, aware of the fact you will be taking steps to obtain relief in that regard.

C S Blackie
District Court Judge